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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-646

A/S ARCADIA,

Petitioner,

—against—

GULF INSURANCE COMPANY,

Respondent.

PETITIONER'S BRIEF IN REPLY

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While much of the brief in opposition is dedicated to what amounts to an *in haec verba* instant replay of the Court of Appeals opinion and would ordinarily not call for a reply, several misconceptions with respect to the petition have surfaced which require correction in the interest of simplification of the issue before this Court.

Additionally, petitioner seeks to reemphasize, on the strength of intervening decisions, that it is within the power of this Court not only to interpret the LHWCA, but also to fashion new or reshape old rules of maritime law where Congress has not expressly acted.

I

1. Respondent on two occasions (pp. 4 and 7), erroneously seeks to charge petitioner with attempting to reinstate an indemnity theory of recovery against the steve-

dore. This, despite petitioner's express acknowledgment (pp. 8-9) that it considers an action for indemnification foreclosed by the amendments to §905 of the LHWCA.

2. A reading of the petition discloses, contrary to respondent's suggestion (p. 6), that petitioner is not pursuing an argument in this Court that it is only responsible for its sole negligence.

3. At the risk of appearing repetitious, it must be said that petitioner, rather than attempting to thwart the will of Congress, seeks to give meaning to the various Congressional expressions of purpose appearing in the legislative history. While the background and text of the amendments are not especially illuminating as to the survival of a "lien" theory of recovery to the stevedore or its underwriter, it is petitioner's position that the Congressional intent set forth in the petition (pp. 6-11) supports the view that Congress could not have contemplated that a negligent stevedore would be permitted to dodge its compensation liability by having such payments refunded to it or its underwriter in the form of a deduction from a longshoreman's recovery against an also negligent shipowner.

It seems to petitioner that the recitation by respondent (pp. 5-6) of increased benefits to longshoremen, rather than supplying safety incentives to the stevedore and/or its underwriter, tends more to exacerbate the problem by affording them proportionately greater encouragement to retrieve such payments from the shipowner.

II

Even those decisions adverse to the shipowners' position recognize an inequity in the way the Act is presently

construed, but acknowledge an impotency to act in view of this Court's prior decisions. Thus, the District Court herein referred (p. 27A) to the "painful result" of having the stevedore employer "off-load to the shipowner his entire liability under the Act" even where its negligence "was the most significant proximate cause of the accident".

The decision cited by respondent in *Lucas* v. *"Brinknes" Schiffahrt Ges.*, 379 F. Supp. 759 (E.D. Pa. 1974) noted (p. 769)

> "This result may leave the shipowner in an unenviable position",

and concluded

> "It is for Congress to provide the proper balance. Court's sense of fairness can only prove disruptive of that balance."

It is of course precisely that equilibrium of rights which the shipowner seeks to preserve in filing this petition.

In *Croshaw* v. *Koninklijke Nedlloyd, B. V. Rijswijk,* 398 F. Supp. 1224 (D. Ore. 1975) also cited by respondent, the Court although constrained to follow an earlier decision, respectively disagreed with that interpretation of the 1972 amendments and noted the results decried by petitioner herein (p. 1232)

> "The inequities of this program are obvious. If the stevedore were 90% negligent, the 10% negligence of the shipowner would be sufficient to cripple him with the entire judgment. Some jurisdictions tolerate this, but I cannot."

The Court went on to state (p. 1233)

> "The manifest injustice of subjecting a joint tortfeasor to an arbitrary level of damages despite minimal culpability was recently condemned by the U.S. Supreme Court. In *United States* v. *Reliable Transfer Co., Inc.*, —— U.S. ——, 95 S. Ct. 1708, 44 L. Ed. 2d 251 (1975), the Court jettisoned the ancient admiralty rule of divided damages."
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> "Legislative history does not reveal whether Congress intended to protect the stevedore's equitable lien from his own negligent conduct as well. Such protection does not appear justified and would clearly violate fundamental principles of equity."

The opinion concluded (p. 1234) with the observation that the stevedore's right to reimbursement being equitable should be subject to equitable regulation.

As the many cases which have been simmering since the 1972 Amendments are now coming to a boil,* we witness the decisions of the Court of Appeals for the 9th Circuit on November 21, 1975 in *Shellman* v. *United States Lines*, —— F.2d —— (75-3071 and 75-3058) and *Dodge* v. *Mitsui Line*, —— F.2d —— (75-1442).**

The *Shellman* Court rejected the District Court proportionate reduction of plaintiff's recovery based on the per-

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* E.g.-*Griffith* v.*Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 44, (3rd Cir. 1975, Petition filed November 6, 1975, No. 75-674) would permit contribution under the LHWCA against a non-stevedore employer. See also *Louviere* v. *Shell Oil Co.*, 509 F.2d 278 (5th Cir. 1975) Nos. 75-502 and 75-505, cited in the petition.

** Petitioner understands the slip opinions are made available to this Court.

centage of stevedore negligence. The Court noted *Croshaw supra,* and also the within decision of the Court of Appeals. It specifically recognized the inequity* of saddling the shipowner with the negligence of the stevedore, but said that to reduce plaintiff's recovery because of that stevedore negligence "would simply shift the inequity from defendant United States Lines to Shellman" (p. 8). There is of course a clear distinction between *Shellman* and the within litigation in that any deprivation of the stevedore and/or carrier's "lien" would not reduce plaintiff's recovery since he is already required to pay it back.

Relying on this Court's decision in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 286 (1952), the *Shellman* Court said that it is for Congress and not the courts to provide a solution to this problem. While deferring in the body of the opinion to Congress under *Halcyon*, which as noted in the petition also said (p. 285) that this Court would "feel free" to fashion rules in this area, "if wholly convinced that it would best serve the ends of justice", the Ninth Circuit rather incongruously observes in footnote 2 that the lien theory was "judicially created", as indeed the petition herein so maintained (p. 10). That being so, there is, of course, no requirement to await further Congressional action.** *Croshaw* supra, confirms there was no indication Congress intended to protect the stevedore's equitable lien from its own negligent conduct.

Irrespective of the direction of their holdings, the lower courts with virtual unanimity believe that it is inequitable

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* The companion *Dodge* v. *Mitsui* case also questioned in footnote 1 "whether it was equitable for the stevedore employer to recover the full amount of its compensation payments even if its negligence were a concurring cause of the longshoreman's injuries".

** Perhaps an inappropriate term. Hearings began on the 1972 Amendments November 16, 1967.

for a negligent stevedore and/or underwriter to escape its compensation obligation when there is a negligent shipowner on whom it may be imposed. There is agreement that the "lien" theory is of judicial not legislative lineage. Since the principal impediment to change has been this Court's *Halcyon* decision, petitioner submits that the time has come, in the language of that decision, to intervene and fashion a more equitable rule so that the ends of justice will best be served.

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Respectfully submitted,

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